SUPREME COURT, U. S.

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No. 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

UTAH PIE COMPANY, *Petitioner*,

v.

CONTINENTAL BAKING COMPANY, CARNATION COMPANY, and PET MILK COMPANY, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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No. 489

UTAH PIE COMPANY, *Petitioner,*

v.

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OPINIONS BELOW

The trial court rendered no opinion on Continental Baking Company's ("Continental's") motion for directed verdict or for judgment in accordance with its motion for directed verdict. The opinion of the Court of Appeals for the Tenth Circuit is not yet reported in the Federal Reporter. It appears at 1965 CCH Trade Cas. ¶ 71,468. It also appears as Appendix A to the Petition and is cited "Petition, App. A, p. —" in this Brief in Opposition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

The sole question presented by this Petition is whether the Court of Appeals erred in concluding that the record contains insufficient evidence to support a finding of violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. 49 Stat. 1528, 15 U.S.C. § 13(a) (1964).

STATUTES INVOLVED

Section 2(a) of the amended Clayton Act is the only statute involved. Its text is printed in Appendix C of the Petition at pp. 91-92.

STATEMENT OF THE CASE

This is a private action for treble damages and injunctive relief in which petitioner charged that Continental, Pet Milk Company and Carnation Company had conspired to drive petitioner out of business and to monopolize trade in the State of Utah in violation of Sections 1 and 2 of the Sherman Act. 26 Stat. 209, 15 U.S.C. §§ 1 and 2 (1964). The complaint also alleged that each of the defendants had individually sold frozen fruit pies "in the State of Utah" at lower prices than in "neighboring states," in violation of Section 2(a) of the amended Clayton Act. R. 15-19.* Continental filed a counterclaim alleging that petitioner had violated Section 2(a) of the amended Clayton Act by granting substantial and con-

* Record references are to the page of the Transcript of Record printed for use in the Court of Appeals and filed in this Court by petitioner.

tinuous price discriminations among competing customers in Salt Lake City. R. 28-30.

All of these claims were tried at the same time to a jury in the District Court for the District of Utah before Chief Judge Willis W. Ritter. Continental's timely motions for dismissal and for a directed verdict were overruled, (R. 556-57, 1127) as were similar motions by the other defendants. The jury returned a verdict in favor of Continental on its counterclaim and a verdict in favor of Continental and the other two defendants on the Sherman Act charges. It also returned a verdict in favor of petitioner against each of the three defendants on the charges of territorial price differences. R. 36-39. The trial court overruled each defendant's motion for judgment under Rule 50(b) of the Federal Rules of Civil Procedure and entered judgments against each defendant. The trial court also entered a judgment n.o.v. for petitioner on Continental's counterclaim, even though no motion for directed verdict at the close of the evidence had been made. R. 36-39, 1291, 1294, 1297.

The money judgment against Continental was in the amount of $74,982 after trebling, plus attorneys' fees and costs. The trial court also granted petitioner sweeping injunctive relief under which territorial price differences were flatly prohibited without regard to whether they might "substantially lessen competition or tend to create a monopoly," and under which each defendant was stripped of all the statutory defenses and justifications. R. 40. The trial court refused a stay of this injunction pending appeal, but a stay was granted by the Tenth Circuit Court of Appeals by order dated March 21, 1963. Petition, App. A, p. 3.

Appeal on the merits was heard on July 11, 1964 by Chief Judge Murrah, retired Chief Judge Phillips (sitting by special designation) and Circuit Judge Lewis. The case was under advisement until May 25, 1965 when the court rendered its unanimous decision reversing each of the judgments and decrees appealed from. The court expressly declined to consider any of the numerous grounds for reversal submitted by Continental except whether the evidence was sufficient to support the verdict. Petition, App. A, p. 4. The sole issue decided by the court was:

> "[W]hether the evidence, when viewed in a light most favorable to Utah Pie and it is accorded the benefit of all the inferences the evidence fairly supports, was sufficient to support a finding as to each defendant that it by price differences or other acts had substantially lessened competition, tended to create a monopoly, or injured, destroyed, or prevented competition with it, or there was a reasonable possibility that by such acts it would do so in the future." Petition, App. A, p. 57.

The legal standard which the Court of Appeals applied in determining this issue was stated as follows:

> "A trial court, in determining whether it will grant a motion for a directed verdict or for judgment n.o.v., should view the evidence in a light most favorable to the party against whom the motion is directed and give such party the benefit of all the inferences which the evidence reasonably supports, even though contrary inferences might reasonably be drawn therefrom, and if the evidence and inferences, so viewed and considered, are of such a character that reasonable men in the exercise of a fair and impartial judgment may reach different conclusions, the motion should be denied. In reaching its determination 'the court may not

> pass on the weight of the evidence or decide where the preponderance of the evidence lies. With the exception of clearly incredible evidence, the court should not consider or pass on the credibility of witnesses and should accept as true the evidence in favor of the party against whom the motion is directed.' In determining whether the motions by the defendants in the instant cases should have been granted, we have so viewed and considered the evidence." [Footnotes omitted.] Petition, App. A, pp. 51-52.

Both petitioner and Continental, as well as Pet Milk and Carnation, are manufacturers of frozen dessert pies. They compete against each other in the Salt Lake City trading area, though through the years covered by the complaint, 1958-1961, Continental was an insignificant factor in the market while petitioner, the only local manufacturer, maintained a dominant position. The respective sales and market shares as recorded by the Court of Appeals (per Plt's. Ex. 62) were as follows.

		Sales in Dozens	Percentage of Market
1958	Utah Pie	37,969.5	66.5
	Continental	754	1.3
1959	Utah Pie	38,372	34.3
	Continental	3,182	2.9
1960	Utah Pie	83,894	45.5
	Continental	3,350	1.8
1961	Utah Pie	102,690	45.3
	Continental	18,799.5	8.3

(Petition, App. A, p. 40)

In June of 1961 Continental, seeking to improve its tenuous position in the market, and having available

to it lower cost pies than it had ever had before (Petition, App. A, p. 84); offered for two weeks a reduced price on one flavor, apple. The offer was repeated shortly thereafter for another two-week period. At this lower price Continental sold to only three customers in the Salt Lake-Ogden area, none of whom was at the time a customer of petitioner, and was unsuccessful in selling to any of the others. About two months after these offers the complaint in this action was filed. R. 161-62, 607; Ex. M-26; Plt's. Ex. 4.

ARGUMENT

The Petition Fails to Present Any Question of Sufficient Importance to Warrant Further Review by This Court

This Petition completely fails to show any "special and important reasons" why a writ of certiorari should be granted. Rules of the Supreme Court of the United States, Rule 19. All that the Petition amounts to is that a private litigant is disappointed with the result of a detailed, conscientious review of a lengthy trial record, conducted on proper legal grounds, by a unanimous Court of Appeals.

The trial involved numerous diverse claims asserted against diverse parties. It consumed 17 trial days. The appellate record of the testimony and arguments of counsel is 1,322 pages long and contains some 270 exhibits, many of them extremely voluminous. The evidence relating to each of the several claims was "commingled and presented to the jury in mass," rendering the jury's task "a most difficult if not an impossible one." Petition, App. A, p. 73. The appellate court took ten months to review this

record and render its decision. Its opinion analyzes the facts with extraordinary care and precision.

This Court's certiorari jurisdiction is not, of course, exercised for the purpose of reviewing evidence and discussing specific facts. *United States* v. *Johnston*, 268 U.S. 220, 227. Moreover, in this case a grant of certiorari would be flatly inconsistent with this Court's opinion as to its need "of the valuable assistance of the Courts of Appeals" in antitrust cases, and with its desire for a modification of the Expediting Act in order to secure review by the Courts of Appeals in government antitrust cases. *United States* v. *Singer Mfg. Co.*, 374 U.S. 174, 175 fn. 1.

There is not presented here any bona fide conflict between the circuits, or with prior decisions of this Court. Petitioner argues that the court below was wrong in holding that on this record Continental's two-week price reduction cannot support a finding of reasonable likelihood of substantial injury to competition. Petitioner claims a conflict here with decisions of other circuits holding that "cessation of antitrust violation does not insulate the wrongdoer." Petition, App. A, p. 38. The argument is frivolous. The issue is not what are the results of discontinuance of illegal prices, but whether the two-week price quotation was illegal.

Petitioner's claim of a conflict with the Fourth Circuit Court of Appeals decision in *Maryland Baking Co.* v. *FTC*, 243 F. 2d 716 (4th Cir. 1957) is without merit. In contrast to the short term price reduction here by a marginal competitor, *Maryland Baking* concerned a situation where a 25 per cent price discrimination was maintained continuously for five years in a marketing area where respondent had only one competitor, causing loss by that one competitor of half its sales volume.

Far from there being a split of authorities, the results of the few cases presenting similar facts have been uniformly in accord with the decision below. See *e.g., Borden Co.* v. *FTC,* 339 F. 2d 953 (7th Cir. 1964); *American Oil Co.* v. *FTC,* 325 F.2d 101 (7th Cir. 1963), *cert. denied,* 377 U.S. 954. In this connection it is noteworthy that the Federal Trade Commission's latest Cease and Desist Order in a territorial price case is authoritatively interpreted not to prevent "temporary promotional price reductions necessary for entry into a concentrated local market." *Lloyd A. Fry Roofing Co.,* Dkt. No. 7908 (1965) (Concurring Opinion of Commissioner Elman, p. 5).

Nor does the Petition present any genuine issue of importance to the administration of the antitrust laws. Petitioner contends that the court below has sanctioned "discriminatory prices resulting in losses on those sales for protracted periods of several years." Petition, p. 36. The claim is false. As the Court of Appeals noted, sales by Continental below actual costs occurred only sporadically. Petition, App. A, p. 39. In every year Continental realized a profit over its actual, direct costs of doing business in the Salt Lake City market. *Ibid;* Ex. M-25, 26. Only by allocating full overhead expenses can a "loss" be shown, but this is only an accounting loss, for the fact is that Continental took in more money than it spent in making its sporadic sales in the Salt Lake market. As to the accounting loss, the court below correctly pointed out that Continental was only a minimal seller in the market and that these accounting losses would not have occurred if it had been able to achieve substantial sales volume. The appellate court also called attention to the fact of record that

petitioner itself suffered the same type of loss in 1958 when it was just getting into the business. Petition, App. A, pp. 39-40; R. 909-10.

CONCLUSION

Petitioner has failed to advance any argument justifying further review of this case by this Court. The questions it claims to present are notably devoid of any import beyond the boundaries of the case, and its contentions on the facts are not supported by the record. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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